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No. 89-1799 (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,
Petitioner,
v.
THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE TIME INC. MAGAZINE COMPANY, AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, THE AUTHORS GUILD, INC., THE POINT REYES (CALIFORNIA) LIGHT, COLLEGE MEDIA ADVISERS, INC., STUDENT PRESS LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, NEWSLETTER ASSOCIATION, EDMUND MORRIS AND DAVID McCULLOUGH

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This brief is respectfully submitted, with the consent of the parties, pursuant to Rule 36.2 of the Rules of this Court, urging affirmance of the decision below.

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of eleven *amici curiae*: The Time Inc. Magazine Company, American Society of Newspaper Editors, National Association of Broadcasters, The Authors Guild, Inc., *The Point Reyes* (Califor-

nia) *Light*, College Media Advisers, Inc., Student Press Law Center, American Civil Liberties Union, Newsletter Association, Edmund Morris and David McCullough. Each of the *amici* is more fully described in the Appendix hereto.

Amici consider this case to be of critical significance in preserving constitutional protection for the publication of words attributed to public officials and public figures in newspapers, magazines, television and radio broadcasts, works of biography and history, and other nonfiction works. *Amici* urge that reporting on the words of public figures should continue to be subject to the same legal standard as reporting on their deeds.

Amici disapprove of deliberate alteration or fabrication of quotes.

INTRODUCTION AND SUMMARY OF ARGUMENT

A public figure who eagerly submitted himself to over 40 hours of tape-recorded interviews and many hours of untaped interviews and conversations did not like the way he was quoted in a few passages published by respondents. He filed a libel and invasion of privacy complaint expressly denying having made certain statements attributed to him in quotation marks. He withdrew his initial complaint, however, after transcripts of the tape-recorded conversations showed that three of the challenged statements were quoted verbatim. Three other complaints were pursued, some of which continued to challenge quotations later found to be taken virtually verbatim from tape-recorded conversations. Following the district court's dismissal of these portions of the amended complaints (for failure to establish falsity), petitioner charged respondents, in his Fourth Amended Complaint, with defaming him in a few passages which were not recorded on tape in the exact words attributed to him in two lengthy magazine articles and a subsequently published book.

I. Libel suits controlled by the actual malice rule often present themselves at summary judgment in a posture where plaintiffs resist the defendants' motion on the ground that there is sufficient evidence for a jury to find actual malice by clear and convincing evidence. As carefully administered by this Court to encourage the breathing room necessary to foster the principles underlying the First Amendment, the fault standard in public figure libel has focused since *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), on whether the writer or publisher had a "high degree of awareness of . . . probable falsity." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). Unless the defendant "in fact entertained serious doubts as to the truth of his publication," even the erroneous publication is protected by the First Amendment. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). In this case, a writer drew upon many hours of interviews and conversation, most of them taped, and published a lengthy account of a complex controversy. As many journalists, biographers and other writers commonly do, she drew upon a considerable volume of notes and tapes, as well as her memory, and placed in quotations many thousands of words.

We urge in Part I that the Court reject petitioner's claim that respondents' alleged departures from journalistic standards "will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment." Brief for Petitioner ("Pet. Br.") 24. As this Court has stated, "there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2685 (1989). We show further that the issues of "actual malice" and "substantial truth" are necessarily intertwined in a libel suit arising from assertedly defama-

tory quotations, and that recognition of this fact was central to the ruling of the court below that unless public figure libel plaintiffs can demonstrate by clear and convincing evidence that the publishers of a quotation in fact understood they were constructing a defamatory falsehood or had a "high degree of awareness of . . . probable falsity," *Garrison* v. *Louisiana*, 379 U.S. at 74, they cannot create a jury issue on actual malice in a libel suit arising from an allegedly defamatory quotation.

II. As this Court recognized in *Time, Inc.* v. *Pape*, 401 U.S. 279, 285 (1971), "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." The types of decisions made in capturing, recording and publishing quotations fall squarely within existing First Amendment doctrine protecting such conduct from the constitutional hazard of a jury verdict on the actual malice issue. As the empirical studies and other material we present in Part II show, when journalists, biographers and other writers publish the remarks of public figures, they face many choices due to a host of practical, technological and other factors. They face, as well, the consequences of human fallibility. Such factors have nothing to do with the writer's or publisher's subjective attitude toward the truth or falsity of published statements. Empirical studies show that discrepancies in words attributed to public figures generally do not change the meaning or context of the words. As further elaborated in Part II, good journalism and good law have lived together when it comes to analyzing allegedly defamatory remarks which are published in the form of quotations. Further, because the law of defamation redresses injury to reputation, there is no principled basis for distinguishing the fault standard for defamatory assertions about what a public figure *did* and similarly hurtful assertions about what a public figure *said*.

III. The challenges petitioner has made to the statements at issue fall into two categories: remarks that were edited in an allegedly misleading fashion and remarks placed in quotations which he denies having made in the precise words attributed to him. The mere fact that petitioner denies having made certain statements should not place a greater burden on respondents to negate malice under Fed. R. Civ. P. 56(e), any more than would his denial of any statement of historical fact. *See Pape*, 401 U.S. at 290. Had respondents paraphrased the same remarks or accused petitioner of other, allegedly defamatory facts, he would bear the same burden under *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986), to produce evidence which "could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." We show in Part III that the court below correctly applied existing doctrine under the First Amendment to reach the conclusion that petitioner did not meet his burden of showing respondents' knowledge of falsity or their reckless disregard of truth as to any of the statements.

ARGUMENT

I. THIS COURT HAS REFUSED TO PRESCRIBE JOURNALISTIC STANDARDS IN ITS ENFORCEMENT OF THE ACTUAL MALICE RULE

A. The Fault Standard In Public Figure Libel Focuses On The Defendant's Subjective State Of Mind

The interplay between the clear and convincing evidence standard of the "actual malice" rule defined in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and the parties' respective burdens in prosecuting and opposing motions for summary judgment under Fed. R. Civ. P. 56 was resolved in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In determining whether public officials or public figures have met their burden to create a genuine issue of material fact in resisting a summary judgment motion on the actual malice question, the Court ruled:

> the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. [*Id.* at 255-56.]

It is insufficient under *Anderson* merely to assert "that the jury might, and legally could, disbelieve the defendant's denial of . . . legal malice," *id.* at 256; rather,

> a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. [*Id.* at 254.]

Of the twelve public figure libel cases which have previously come before this Court where application of the *New York Times* actual malice rule was dispositive in cases involving false factual assertions, all but one involved allegedly defamatory allegations about what someone *did*.[1] *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-86

[1] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (allegations in advertisement by civil rights advocates accusing Montgomery, Alabama police officials of using repressive tactics toward demonstrators); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (district attorney accused eight judges of official misconduct); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (college athletic director charged of conspiring to "fix" a 1962 college football game); *Associated Press* v. *Walker*, 388 U.S. 130 (1967) (wire report stating that political activist had led the charge against federal marshals sent to enforce court desegregation decree and had urged rioters to use violent measures); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967) (per curiam) (newspaper editorials accusing candidate for court clerk of official misconduct); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (accusation that deputy sheriff was implicated in illegalities, including corruption, in the sheriff's office); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971) (losing candidate for U.S. Senate accused of having been a "bootlegger"); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (television segment challenging the bona fides of a U.S. Army general's allegations of atrocities during the Vietnam war); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (critical review of the sound quality of plaintiff's loudspeaker system focusing on whether the sound of musical instruments as heard through plaintiff's loudspeaker system tended to wander "about the room"); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (magazine articles accusing self-described "citizens' lobby" of neo-Nazi, anti-Semitic, racist and fascist activities); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678 (1989) (candidate for a municipal court judgeship accused of using "dirty tricks" and offering grand jury witness and her sister jobs and a free trip "in appreciation" for their help in the investigation).

(1971), and this case, involve allegedly defamatory allegations about what someone *said*. As this Court recognized in *Pape*, *id.* at 286, "[t]he question of the 'truth' of such an indirect newspaper report presents rather complicated problems."

Petitioner disregards the core constitutional principle that the defendant must entertain subjective doubts about the truth of the publication. He argues that "a jury could infer knowing falsity *solely* from the objective evidence that Malcolm attributed words to Masson that he did not say." Pet. Br. 43 (emphasis added). Alleged falsehoods in other contexts have never been held to such a standard; indeed, in *St. Amant* v. *Thompson*, 390 U.S. 727, 733 (1968), the Court applied the subjective standard of *New York Times*, 376 U.S. at 287-88, when it ruled that a falsehood arising from "[f]ailure to investigate does not *in itself* establish bad faith." (Emphasis added.) When assessing the evidence of actual malice as to statements about what public figures have allegedly done, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* at 731. Rather, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*

Absent evidence that the writer in fact entertained serious doubts about the substance of the remarks attributed to the public figure, or evidence that the writer knowingly enhanced the defamatory "sting," there is no

principled reason for distinguishing between liability for asserting errors of historical fact and liability for errors in attributed quotations. As the focus of libel law is on reputational injury,[2] it is utterly irrelevant whether such injury arises from the publication of defamatory quotes, paraphrases or other forms of false factual assertion. The court below correctly recognized that petitioner's narrow focus on quotation marks was a red herring and held that the traditional actual malice inquiry applies to quoted remarks of public figures.[3]

Petitioner claims that respondents' alleged departure from journalistic standards "will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment." Pet. Br. 24. While this Court has held that objective evidence of journalistic standards may in some cases be "supportive of the court's ultimate conclusion" that the actual malice standard has been met, "courts must be careful not to place too much reliance on such factors." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2686 (1989). The reason for this caution lies at the core of our First Amendment jurisprudence and this Court's recognition that

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[2] *See* Cal. Civ. Code § 45a (West 1982); W. Keeton, *Prosser and Keeton on the Law of Torts* § 111 (5th ed. 1984); Restatement (Second) of Torts § 558 (1977).

[3] Notwithstanding the *New York Times* rule's critical focus on the writer's or publisher's subjective state of mind, it has nonetheless been tempting in public figure libel cases for plaintiffs to recount the ways in which an article could have been more precise, comprehensive or balanced when opposing the defendants' summary judgment motion. *See, e.g., Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 34 (D.C. Cir. 1990) (reliance on "biased" source); *Chang* v. *Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990) (failure to confirm information with a second source); *Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 623 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988) (failure to include certain language); *Saenz* v. *Playboy Enters.*, 841 F.2d 1309, 1319 (7th Cir. 1988) (alleged failure to check facts more thoroughly). In each of these cases, summary judgment was affirmed because the subjective test had not been satisfied.

> in many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.

Time, Inc. v. *Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

In *Harte-Hanks* the Court reinforced the *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and *St. Amant* line of cases that declines to resort to journalistic standards or ethics as the defining measure of the fault standard. While ultimately concluding that the actual malice standard had been met, the Court took pains to reiterate its unqualified rejection of a professional standards rule, first tracing the rule's initial promotion by Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967):

> In place of the actual malice standard, Justice Harlan suggested that a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." This proposed standard, however, was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. Moreover, just four years later, Justice Harlan acquiesced in application of the actual malice standard in public figure cases, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 69-70 (1971) (Harlan, J., dissenting), and by the time of the Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court was apparently unanimously of this view. *Today, there is no question that public figure libel cases are controlled by the* New York Times *standard and not by the professional standards rule, which never commanded a majority of this Court.* [*Id.* at 2685 (emphasis added, citations omitted).]

Accord Tavoulareas v. *Piro*, 817 F.2d 762, 796 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987) (the court "do[es] not sit 'as some kind of journalism

review seminar offering our observations on contemporary journalism and journalists' ") (quoting *Tavoulareas* v. *Piro*, 759 F.2d 90, 145 (D.C. Cir. 1984) (Wright, J., dissenting)); *Fletcher* v. *San Jose Mercury News*, 216 Cal. App. 3d 172, 187, 264 Cal. Rptr. 699, 706 (1989), *cert. denied*, 111 S. Ct. 51 (1990).

B. The Actual Malice Standard Incorporates The Doctrine Of "Substantial Truth"

Under federal law, truth is a constitutionally mandated defense to a state defamation action. *See Garrison*, 379 U.S. at 77-78; *New York Times*, 376 U.S. at 279-80. Lower federal courts have accorded constitutional protection to "substantially truthful" publications. *See, e.g.*, *Tavoulareas* v. *Piro*, 817 F.2d at 783; *Zerangue* v. *TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987). Under California law, "substantial truth" is a complete defense to a libel action. *See Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (statement not libelous if, "although not literally true in every detail, [it] is substantially true in its implication, that is that the 'gist' or 'sting' of the article, read as a whole, is true"). Moreover, as the court below recognized, both federal and California law require a public figure plaintiff to prove that allegedly libelous statements were "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 895 F.2d at 1536 (quoting *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal. 3d 244, 256, 690 P.2d 610, 617, 208 Cal. Rptr. 137, 144 (1984)).

In both theory and practice, the "actual malice" standard and the "substantial truth" doctrine tend to merge.[4] Absent recognition of the defense of "substantial truth," the actual malice standard "would not exist for errors of interpretation . . ., for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." *Time, Inc.* v. *Pape*, 401 U.S. 279, 291 (1971). That recognition is central to the Ninth Circuit's analysis of petitioner's claims,

for it is plain that the "substantial truth" of the quotations and passages which Masson challenges (as determined from his tape-recorded comments and other evidence) was critical in convincing the court below that petitioner had failed to present evidence sufficient to create a triable issue on "actual malice" under *Anderson*, 477 U.S. at 252. Accordingly, if a statement is substantially true, in a quotation setting or otherwise, the Court need not reach the issue of actual malice. *See, e.g.*, *Anderson* v. *Cramlet*, 789 F.2d 840, 846 (10th Cir. 1986) (applying Colorado law); *see Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).

II. REPORTING ON THE WORDS OF PUBLIC FIGURES SHOULD CONTINUE TO BE SUBJECT TO THE SAME LEGAL STANDARD AS REPORTING ON THEIR DEEDS

In *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-86 (1971), the Court recognized that

> a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like.

In advancing a virtual *per se* rule for allowing juries to award damages for non-verbatim accounts of quoted words, petitioner proclaims: "Masson's words spoke for themselves—they were not just describing an underlying event, *they were the event*." Pet. Br. 34 (emphasis added). Petitioner thus makes respondents' point for them—that there is no logical basis for distinguishing liability for defamatory errors in quotation and errors of

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[4] The courts below undertook an exhaustive inquiry to determine whether the quoted statements were substantially true. *See Masson* v. *New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539-41, 1542, 1543-44 (9th Cir. 1989); *Masson* v. *New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1407 (N.D. Cal. 1987) ("each of the alleged defamatory statements is either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations").

historical fact. The assertion is also notable in that petitioner ignores the mass of untaped information from which the articles were derived and discounts completely the daunting task of reducing the spoken to the written word.[5] A person's ability to capture in writing the exact words of a speaker depends on many objective variables: the audibility, cadence and clarity of the speaker; the hearing ability of the writer; the writer's knowledge of shorthand or other methods of abbreviation; whether the subject matter is interesting or boring to the writer; the writer's memory, concentration, educational background and vocabulary; and a host of external factors, such as visual and aural distractions.[6]

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[5] Writers and biographers have had widely divergent experience using tape recorders to assist their efforts. Many biographers find that the tape recorder complicates rather than facilitates the writer's task in sifting through the pertinent material. In recounting the research for her Pulitzer Prize-winning book, *Stilwell and the American Experience in China* (1971), Barbara Tuchman writes:

> The effort needed to write a book, even of memoirs, requires discipline and perseverance which until now imposed a certain natural selection on what survived in print. But with all sorts of people being encouraged to ramble effortlessly and endlessly into a tape-recorder, prodded daily by an acolyte of Oral History, some veins of gold and a vast mass of trivia are being preserved which would otherwise have gone to dust.

Tuchman, "Problems in Writing the Biography of General Stilwell," in *Practicing History* 65, 72 (1981). Tuchman also finds tape recorders to be incompatible with her style:

> A woman is accustomed to entering upon a conversation as a personal thing, even with a stranger—perhaps more so with a stranger—and I can't imagine myself plunking a machine down in front of someone and saying, "Now, talk."

Id. at 68. *Compare* Rosengarten, "Stepping Over Cockleburs: Conversations with Ned Cobb," in *Telling Lives: The Biographer's Art* 105, 116 (M. Pachter ed. 1979) (*"Telling Lives"*). As discussed at p. 15, *infra*, at least one study has shown that news accounts based on tape recordings contain the same kinds of errors as non-taped remarks.

[6] In his remarkable account of how reporters of congressional debate in colonial America managed to perform their craft until the publication of Thomas Lloyd's shorthand method, historian Thomas C. Leonard writes: "Since there was no clear model from the old world on how to report the discourse of a republic, these men had to develop their own approach. The craft remained personal and eclectic . . . . Until the middle of the nineteenth century reporters were self-taught, borrowing parts of other people's systems and relying on their special knack of remembering what had been said." T. Leonard, *The Power of the Press: The Birth of American Political Reporting* 69 (1986).

The Court recognized in *Pape* that "[a]ny departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." 401 U.S. at 286. These choices depend on still other variables, including time, space, talent and the writer's ethical compass. Writers of all types face such dilemmas every day, a fact which no doubt accounts for the continuing debate among writers about the permissible liberties one can take with quoted remarks. Many reject the formulaic rules of the journalism texts, not only because the aspiration cannot match the reality but because, in the view of some, it is not a sufficient aspiration. William Zinsser, an author and respected authority on nonfiction writing, has made the following observation about the writer's dual obligations to the person interviewed and the reader:

> You will find that he said much that is redundant or dull. Try to single out the quotations that are most important or colorful. You will be tempted to use all the words that are in your notes because you performed the laborious chore of getting all the words down. This is no reason for putting the reader to the same trouble. Your job is to distill the essence.
>
> What about your obligation to the person you interviewed? To what extent can you cut or juggle his words? This question vexes every writer returning from his first interview—and it should. But the answer is not hard if you keep in mind two standards: brevity and fair play.
>
> Your ethical duty to the person being interviewed is to present his position accurately. If he carefully weighed two sides of an issue and you only quote his

views of one side, making him seem to favor that position, you will misrepresent what he told you. Or you might misrepresent him by quoting him out of context, or by choosing only some flashy remark without adding the serious afterthought. You are dealing with a man's honor and reputation—and also with your own.

But after that your duty is to the reader. He deserves the smallest package. Most people meander in their conversation, filling it with irrelevant tales and trivia. Much of it is delightful, but it is still trivia. Your interview will be strong to the extent that you get the main points made without waste.

Therefore if you find on page 5 of your notes a comment which perfectly amplifies a point on page 2—a point made earlier in the interview—you will do everyone a favor if you link the two thoughts, letting the second sentence follow and illustrate the first. This may violate the truth of how the interview progressed, but you will be true to the intent of what was said. Play with the "quotes" by all means—selecting, rejecting, thinning, transposing their order, saving a good one for the end. Just make sure that the play is fair. Don't change any words or let the cutting of a sentence distort the proper context of what remains.

W. Zinsser, *On Writing Well: An Informal Guide to Writing Nonfiction* 82-83 (2d ed. 1980).

Recent empirical studies support the existence of a tolerable margin between aspiration and reality and show that Mr. Zinsser's guidance leads in most circumstances to substantially accurate quotations. In a 1989 study,[7] public meetings and speeches in Arizona were tape-recorded by the study's author, a professor of linguistics, who examined 24 resulting news articles (written by professional journalists and journalism students) for their fidelity to the tape recording. The discrepancies were coded into four categories: same meaning, similar

[7] Lehrer, *Between Quotation Marks*, 66 Journalism Quarterly 902 (Winter 1989) ("Lehrer").

meaning, different but compatible meaning and different meaning. Less than half (45.8%) of the accounts of news events and interviews produced verbatim reports. However, the sources who were quoted, when asked to review the accuracy of the articles, themselves concluded that 98.6% of the *non-verbatim* reports were substantially true and fell into the following categories:

61.7% same meaning
25.6% similar meaning
11.3% different but compatible meaning.

Sources pointed to only 2 sentences of 133 total sentences containing quotations where the departures from the tape recording resulted in different meanings.[8] Significantly, the Lehrer study also showed that "reporters . . . who used tape recorders did not produce stories of greater accuracy than those who used notes. In fact, the same kinds of errors in quotations can be found in transcriptions by those individuals who helped me transcribe tapes." Lehrer at 904. In a 1986 study of newspaper coverage of a celebrated trial in Canada (where tape recorders were prohibited), of 1,551 paragraphs with quotations from trial testimony, 883 paragraphs contained differences in quotations. The study produced 615 minor

[8] Few journalists or writers check the accuracy of quotations with the person interviewed after the fact. One writer remarked, "The interviewer is lucky if the subject does not 'improve' them as well." J. Brady, *The Craft of Interviewing* 116 (1976) ("Brady"). In one study which asked news sources whether they were quoted accurately in newspaper articles, 20% stated they were "misquoted":

> Their response is surely tempered by their perception of how the news story depicts them. If it enhances them or agrees with their self-perception, they are more likely to agree with the story's accuracy than if they are deprecated or ridiculed. This is especially true with quotations. Upon reflection, a person may wish he had not said something, or had said it differently. That wish may influence his recall.

Berry, *A Study of Accuracy in Local News Stories of Three Dailies*, 44 Journalism Quarterly 482, 484 and Table 2 (1967).

discrepancies and 417 major discrepancies (where the meaning or connotation was altered).[9]

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[9] Calamai, "Discrepancies in News Quotes from the Colin Thatcher Trial," in *Trials and Tribulations* (N. Russell ed. 1986), Table 4 (University of Regina, Saskatchewan). The former Saskatchewan Energy Minister was on trial in 1984 for the murder of his wife. Calamai found especially telling the discrepancies in news accounts of a key witness's most "popular" quote, in which she recounted Mr. Thatcher as saying (according to the official transcript): "I have to admit it is a strange feeling to have blown your wife away." The newspaper accounts of this quotation included the following permutations:

"a strange thing to blow your wife away"
"a strange feeling blowing your wife away"
"a strange feeling to blow your wife away."

According to Calamai, "[o]bviously, none of these discrepancies changed the meaning or connotation of the quotation."

Judges, lawyers and witnesses have long recognized that even the most conscientious court reporters cannot produce error-free transcripts. *See, e.g., United States v. Perkins*, 498 F.2d 1054, 1058 & n.4 (D.C. Cir. 1974); Fed. R. App. P. 10(e); Walker, "Language at Work in the Law," in *Language in the Judicial Process* 203, 212-13 (J. Levi & A. Walker eds. 1990).

Even when a transcript is available prior to publication, and where one word can make a critical difference in the defamatory "sting" of the statement, human beings are fallible. During the intense media coverage of the Watergate affair, a misplaced homonym produced considerable confusion and consternation arising from statements by President Nixon at a press conference on September 5, 1972. The President was asked whether he had listened to certain tapes of Oval Office conversations. The White House transcript quoted President Nixon as saying in response:

> "As a matter of fact, the only time I listened to the tapes, *to certain tapes*—and I didn't listen to all of them, of course —was on June 4th [italics added]."

The *New York Times* transcript of the press conference provided the following account:

> "As a matter of fact, the only time I listened to the tapes, *two certain tapes*—and I didn't listen to all of them, of course —was on June 4th [italics added]."

Lewis, "Some Errors and Puzzles in Watergate Coverage," *Columbia Journalism Review*, Nov./Dec. 1973 at 28.

A series of articles in major newspapers and weekly magazines drew various inferences from the President's statement. Time magazine, for example, suggested that the President's claim that the Oval Office tapes were compatible with his innocence was "puzzling" as he had listened to only two of the pertinent tapes. *See id.* at 28-29. It was not until presidential press secretary Ron Ziegler issued a statement a week later that the matter was clarified.

A recent example of news reporting on a high profile federal court case further illustrates the point. On November 21, 1990, Michael R. Milken, the former head of "junk bond" operations at Drexel Burnham Lambert, Inc., was sentenced in a Manhattan federal court. An unofficial court transcript of the sentencing proceedings (the only one available) set forth the following excerpt from the sentencing judge's comments:

> When a man of your power in the financial world at the head of the most important department of one of the most important investment banking houses in this country repeatedly conspires to violate and violates securities and tax laws in order to achieve more power and wealth for himself and his *wealthy* clients and commits *financial crimes that are particularly hard to detect, a significant prison term is required in order to deter others.*[10]

The front-page story of *The New York Times* the next day contained the following quotation:

> "When a man of your power in the financial world, at the head of the most important department of one of the most important investment banking houses in this country, repeatedly conspires to violate and violates securities laws and tax laws in order to achieve more power and wealth for himself and his [*wealthy*] clients, and commits *financial crimes that are particularly hard to detect, a significant prison sentence is called for,*" Judge Wood said.[11]

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[10] Transcript (Unofficial) of Sentencing of Michael R. Milken, *United States* v. *Milken*, (S) 89 Cr. 41 (KMW), Nov. 21, 1990, *reprinted in* Sec. Insider Trading Litigation Rep. (Andrews) at 7657 (Dec. 5, 1990) (emphasis added).

[11] *Milken Gets 10 Years for Wall St. Crimes*, N.Y. Times, Nov. 22, 1990, at A1, col. 6 (emphasis added).

The lead editorial in *The Wall Street Journal* on November 23, 1990 stated:

> Crimes that are "harder to detect warrant greater punishment to deter others," she said.[12]

The *Journal*'s news story, which ran the same day, set forth a fuller quotation from the court transcript:

> "You [also] committed crimes that are hard to detect, and crimes that are hard to detect warrant greater punishment in order to be effective in deterring others from committing them."[13]

The foregoing examples suffice to illustrate that "memory for meaning is better than memory for verbatim prose."[14] They also illustrate the following humble truths: memory is imperfect; some people have better memories than others; people speak faster than they can write; tape recorders and video cameras are not always available, acceptable to interviewees, legally permissible, in good working order, or conducive to eliciting candid information in the first place; and the daily newspaper, the weekly magazine, the evening newscast, the literary profile and the broad spectrum of biographical works represent different genres, each of which routinely employs quotations, sometimes using different standards in so doing. The result is that honest, conscientious reporters, authors and biographers, who cannot possibly report all words of public figures in the exact sequence originally spoken, and in full text, do the best they can to capture accounts of their exact words, or at least their rational rendering of the words spoken, trying their best to preserve the context and meaning.[15]

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[12] *Symbol of the 90's*, Wall St. J., Nov. 23, 1990, at A8, col. 1.

[13] *Milken's Stiff 10-Year Sentence Is Filled With Incentives to Cooperate With U.S.*, Wall St. J., Nov. 23, 1990, at A3, col. 3; *see also* Brady at 206.

[14] Lehrer, *Remembering and Representing Prose: Quoted Speech as a Data Source*, 12 Discourse Processes 105, 121 (1989).

[15] Historians and biographers who write about or quote living people confront the same range of options for capturing, recording and editing the remarks of public figures and share a corresponding legal risk. "A biographer works in mosaic, translating fragments of life into a sequence of words: a highly responsible task with an unwritten ethic of its own." L. Edel, *Writing Lives* 109 (1984).

It is, of course, not surprising that some academics and working journalists exhort writers to use quotations only when the words are "verbatim." Others counsel editing and rewriting which still remains faithful to the speaker's meaning.[16] *Amici* respectfully suggest that while the latitude journalists, biographers or other writers may knowingly take with spoken words is an important subject for continuing debate within the writing professions, "press responsibility is not mandated by the Constitution." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974). Even if it were, the largely unexamined axiom that it is possible for two human beings to produce the identical quotation is dubious, as the above-cited studies demonstrate.

With certain exceptions not relevant to the present discussion,[17] the dissent below would invite a jury determination on the malice question whenever a person interviewed challenges a writer's or author's recollection of his or her words. If that were the law, a jury trial would ensue each time a reporter, author or biographer,

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[16] *See, e.g.*, Weaver, Hopkins, Billings & Cole, *Quotes vs. Paraphrases in Writing: Does it Make a Difference to Readers?*, 51 Journalism Quarterly 400 (Fall 1974) ("Many professionals argue for changing direct quotes slightly, perhaps correcting improper grammar and omitting redundancies and doing other condensing—still enclosing the remarks within quotation marks. That argument boils down to giving the gist of the speaker's remarks with no change in meaning, yet doing so in a succinct and readable manner.").

[17] The dissent would remove from the suspect categories inaudible words, words spoken in a foreign language, editing to improve grammar or to avoid embarrassment to the speaker, and passages signaled as being non-verbatim. 895 F.2d at 1558, 1563, 1564 (Kozinski, J., dissenting).

Petitioner would carve out paraphrases, misperceptions, minor changes to correct for grammar or syntax, publications which alert readers that conversations have been fictionalized, and inartful translations. Pet. Br. 18, 36-37.

in good conscience, scribbling as quickly as he or she can, produces deviations from the "verbatim" remarks of public officials or public figures who later claim they are defamed by the words attributed to them.

Further, liability for a writer's non-verbatim attribution of allegedly defamatory quotations to public officials or public figures should not depend on the myriad methodological, technological and editorial choices which writers and editors make every day. Were the standard to rest on these practical variables, the "quantum and quality" [18] of the evidence of actual malice weighed by the trial court might depend, for example, on whether a tape recorder was used for some portions of an interview but not others. Reporters and writers would then act at their peril in publishing untaped portions of interviews for fear that a jury might, as petitioner and the dissent below urge,[19] be allowed to infer actual malice from the mere failure to use taped portions. Liability could also turn on whether the interviewee believed that only taped remarks would be used, whether an audiotape or videotape was legally permissible, whether the publisher is in the print or broadcast medium, or whether the interview was conducted in person or on the telephone.[20] Even

[18] *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

[19] *See* 895 F.2d at 1552 n.6 ("While Malcolm tape-recorded most of what Masson said, she now claims that some of Masson's most damaging statements—including his use of the term intellectual gigolo—were made during a conversation that was not recorded. Masson claims that he never made such a statement. *The jury might infer from the absence of a tape recording that Malcolm fabricated the remark.*") (emphasis added) (Kozinski, J., dissenting). This is, indeed, the crux of petitioner's argument. "This was also not a question of misperception or faulty notes. Since Malcolm attended the interviews *and had possession of the tapes*, she necessarily knew that the quotes she was attributing to Masson were false . . . ." Pet. Br. 26 (emphasis added).

[20] A telephone interview has definite disadvantages, as the whole range of communicative body language and facial expression is absent. A wire service reporter in the 1960's mistakenly reported that civil rights leader James Meredith was "shot dead," when the

when there is no tape recording, petitioner argues that a public figure's mere denial is sufficient to create a jury issue on the malice question. Pet. Br. 43. Writers also might be forced to retain every scrap of paper and notation from interviews lest the destruction of their handwritten notes, coupled with an interviewee's subsequent denial, produce a jury issue.[21] None of these methodological choices sheds any light on the publisher's subjective awareness of the probable falsity of published quotes and none is, therefore, constitutionally sufficient evidence of actual malice under *New York Times* and its progeny.

III. NON-VERBATIM DEPARTURES FROM QUOTED REMARKS WHICH ARE THE PRODUCT OF RATIONAL EDITORIAL JUDGMENTS OR DO NOT CAUSE REPUTATIONAL HARM CANNOT ALONE ESTABLISH ACTUAL MALICE

Unlike the record on the malice issue available in *Harte-Hanks* v. *Connaughton*, 109 S. Ct. 2678, 2697-98 (1989), where critical interviews of a grand jury witness and the plaintiff "were captured on tape, [and] there [could] be no dispute as to what was communicated, nor how it was said," here, petitioner elected to sue for damages for the publication of a few statements which were not recorded on tape in the exact words published by respondents. Petitioner acknowledged that he knew that some of his interviews and conversations with respondent Malcolm were not tape recorded. J.A. 237-39.

reporter was actually told on the telephone that he was "shot in the head." *See* Brady at 174, 181.

[21] The dissent below implies that such accumulation should be the rule. 895 F.2d at 1552-53 n.7. *But see Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 33-35 (D.C. Cir. 1990) (affirming summary judgment notwithstanding plaintiff's claim that reporter's inability to reconstruct his notes was evidence of actual malice); *Chang* v. *Michiana Telecasting Corp.*, 900 F.2d 1085, 1090-91 (7th Cir. 1990) (reporter's inability to produce notes does not permit inference of actual malice).

A. Respondents' Editorial Judgments Produced A Rational Interpretation Of Ambiguous Remarks

In *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), the Court reviewed a court of appeals decision which rested on the premise that a magazine's deletion of the word "alleged" from its published account of the findings of a 1961 Civil Rights Commission report on the subject of police brutality was sufficient to sustain a jury finding of actual malice. The Court held:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact. [*Id.* at 290.] [22]

Pape was the anchor of this Court's decision in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). In *Bose*, the critical statement in Consumer Reports magazine about a loudspeaker system was that "individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander *about the room*." *Id.* at 488 (emphasis added). The evidence proffered by the plaintiff on the malice issue was a Consumers Union engineer's written report stating that the "[i]nstruments . . . appeared to suffer

[22] The author of the article testified at trial that the "full context of the Justice report" of the Monroe incident indicated to him that the incident had occurred as described, and he denied, therefore, having falsified the report. A Time researcher testified that after consulting several articles describing Monroe's claims about the raid and other articles decribing Pape's career, she believed the article was "true" as written. *Id.* at 283.

from giganticism and a tendency to wander *around the room*." *Id.* at 494 (emphasis added). At trial, the engineer testified that his actual perception of the movement of the sound source at the time of testing was "along the wall" rather than "about the room." Based on these discrepancies, the trial court determined that there must have been malice in light of the engineer's understanding and the words he actually used, entering a verdict in favor of the plaintiff.

The court of appeals reversed, 692 F.2d 189 (1st Cir. 1982), and this Court affirmed. Notably, the Court refused to equate the engineer's "misconception" with the demanding actual malice standard:

> "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves*." *Time, Inc.* v. *Pape*, 401 U.S., at 285. See generally *The Santissima Trinidad*, 7 Wheat. 283, 338-339 (1822). Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. *Time, Inc.* v. *Pape*, *supra*, at 290. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.

466 U.S. at 512-13 (emphasis in original).

As in *Pape*, respondents here published an account of complex academic and personal subjects based on a substantial volume of material. Instead of interpreting a complex document, however, respondents published an account of petitioner's words, based on 40-50 hours of tape-recorded interviews, and notes and recollections of many unrecorded interviews, all of which formed a body of "external evidence of [Masson's] overall meaning." *Pape*, 401 U.S. at 290. Like the respondent in *Bose*, respondent Malcolm published her understanding or conception of what Masson said in a few quoted passages which were neither recorded on tape in the exact words published, nor witnessed by others.

Accordingly, for petitioner to prevail with respect to the statements he claims were distorted, he must demonstrate the following by clear and convincing evidence. First, petitioner must show that the meanings of his actual statements were so materially altered that the published account was neither a rational interpretation nor a substantially correct recitation of his views. If such distortion occurred, petitioner must then show either that respondents were aware that the editing produced this result or that they acted with reckless disregard in not being so aware. The Ninth Circuit held that actual malice would not be found when "quotations are either 'rational interpretations' of ambiguous remarks made by the public figure, or do not 'alter the substantive content' of unambiguous remarks actually made by the public figure." 895 F.2d at 1539 (citations omitted). A quotation that rationally interprets an ambiguous remark or does not alter the substantive content of an unambiguous remark cannot be "false" for the unremarkable proposition that the author has not changed the meaning of what he or she believed the declarant said. (See Part IB, *supra.*) Thus, if a published quotation meets the court of appeals' criteria, a plaintiff cannot prove malice by clear and convincing evidence because it is impossible to show that the defendant in fact "entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).

By focusing on these questions, the court of appeals' analysis is wholly consistent with this Court's oft-stated rule (summarized at pp. 5-10, *supra*) that the actual malice standard requires a determination of each defendant's subjective attitude toward the truth or falsity of a publication. *See Harte-Hanks*, 109 S. Ct. at 2696; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974); *St. Amant*, 390 U.S. at 731.

In two of the offending statements, petitioner claims that Malcolm editorially distorted the sense of his statements in a fashion that defamed him. In one statement, he claims Malcolm appended a quotation from a different

conversation to the end of a discussion which Masson claims was not related to it, allegedly causing him to appear as if he were taking credit for a discovery that was not his. In the second statement, Malcolm "remov[ed]" an intervening passage, Pet. Br. 34, shortening the quotation and, according to Masson, completely changing the sense of his statement.

Masson's central contention is no different than the contention of many persons dissatisfied with the manner in which their statements are editorially presented.[23] He advances the novel proposition, however, that virtually any departure from "a full direct quotation" should be sufficient to sustain a jury verdict of actual malice. Pet. Br. 33. That remarkable departure from prevailing doctrine would create a jury issue, even in public figure cases, every time a reporter rationally interprets an ambiguous remark, or reduces a long interview on complex subjects, in a manner with which the speaker disagrees or by attributing quotations that the plaintiff denies making. Indeed, that possibility is the very one protected against in *Pape*, where the Court acknowledged that reporting on the words of public figures "presents rather complicated problems" and will entail "an almost infinite variety of shadings." 401 U.S. at 286. To allow liability to accrue to writers and publishers for what may at most be a "misconception" arising from an interviewee's awkward, ambiguous or confusing construction of the world of subjects reported in the media and other works of nonfiction "would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact." *Id.* at 290.

It is undeniable that editorial decisions to "thin" quotes, or transpose or rearrange their order, is a process that occurs every day in every newspaper, television and radio station in America, as well as in various works of non-

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[23] *See, e.g., Tavoulareas* v. *Piro*, 817 F.2d 762, 769-71 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987); *Vachet* v. *Central Newspapers*, 816 F.2d 313, 316-17 (7th Cir. 1987); *Anderson* v. *Cramlet*, 789 F.2d 840, 844-45 (10th Cir. 1986).

fiction writers.[24] To create a jury issue in public figure libel for editorial judgments made daily in the sometimes hurried exercise of publishing a newspaper or magazine, or airing a television or radio broadcast, would produce a rule wholly at odds with the First Amendment's guarantee of "breathing space," *New York Times*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), for "a vigorous and uninhibited press." *Gertz*, 418 U.S. at 342. Indeed, such a rule could effectively preclude summary judgment in libel suits based on assertedly defamatory quotations. *See* note 26, *infra*. The Ninth Circuit's consideration of the alleged editorial distortions by respondents measured the ambiguity, confusion and volume of the actual statements and weighed whether respondents' account, as supported by Malcolm's declarations (J.A. 46-61, 82-86), was rational.[25] In so doing, it concluded that respondents did not in fact entertain a "subjective awareness of probable falsity" in making their editorial judgments. Without more, the court correctly held that petitioner's evidence fell short of the demanding *Anderson* standard. 895 F.2d at 1542.

B. Non-Verbatim Departures Which Do Not Increase The Defamatory Impact Or Alter Substantive Content Cause No Reputational Injury

The remaining statements challenged by Masson are, he contends, wholly "fabricated" as they do not appear on transcripts of his tape-recorded interviews. Pet. Br.

[24] According to Leon Edel, "a biographer is a storyteller who may not invent his facts but who is allowed to imagine his form. He is like the sculptor who doesn't invent his clay, or the painter who doesn't invent the tubes out of which he squeezes his paint. The biographical imagination is exercised upon gathered data; and the squeezed colors may not be mixed or blended. They can only be arranged." Edel, "The Figure Under the Carpet," in *Telling Lives* 17, 20 (1979).

[25] Petitioner seeks to avoid the force of *Pape* by ignoring the considerable volume of his undisputed statements, then limply stating, "since [Malcolm] had tape recordings there was no ambiguity as to the actual words used, and she faced no choices in quoting Masson verbatim." Pet. Br. 33.

20-21. Petitioner claims that the quotations are "false," "fake," "calculated falsehood[s]," and "fabricated," and that this is a case about the "right to fake quotes." Pet. Br. 22-31.

Masson's claims are thus founded on his categorical denial that he said the words attributed to him, and his conclusion that, accordingly, respondents must have been aware of their "falsity." Petitioner ignores the critical distinction between "false" quotations (which are "false" merely because he claims not to have said them, but otherwise contain his views) and quotations that do not substantially reflect his statements and opinions as derivable from other evidence.

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), the Court made plain that "[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*." Petitioner's refrain that an allegedly invented or deliberately altered quote is *per se* proof of knowledge of falsity is an attempt to evade scrutiny of what Malcolm undisputedly knew—the precise words Masson uttered to her as captured by the tape recorder or in notes or memory. And it is her knowledge and state of mind that are the touchstones of the "actual malice" analysis.

Applying the *Anderson* standard, the court below reviewed a lengthy collection of transcripts of Masson's own comments, which related to the same subjects as the challenged quotations. Based upon that review—of a quantity of evidence far greater and more supportive of the published work than is typically the case in public figure libel actions—the court correctly concluded that neither the quantum nor the quality of Masson's evidence was sufficient "to allow a rational finder of fact to find actual malice by clear and convincing evidence." 477 U.S. at 254.[26]

[26] The courts below declined to consider Malcolm's typewritten notes which were offered, together with her declarations (J.A.

The facts reviewed by the court were far from the extreme case where the challenged quotations were concededly invented by the reporter from whole cloth without ever having spoken to the person quoted, as in *Carson* v. *Allied News Co.*, 529 F.2d 206, 212-13 (7th Cir. 1976), or *Selleck* v. *Globe International, Inc.*, 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838, 844 (1985).[27] The facts in *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), are closer. The Eng-

46-61, 82-86), as negating malice as to three of the challenged statements (J.A. 52-53, 59, 112-15, 127, 135-36). We believe the courts below could have, and this Court should, consider those notes on this issue because nothing Masson has offered to challenge the notes contradicts the content of the notes as an accurate reflection of *what Malcolm heard Masson say* on those three occasions.

At the summary judgment stage, a reporter's notes are often critical evidence negating malice, and the public figure plaintiff's effort to discount notes has been rejected. *See, e.g., Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990) (reporter's claim that he accurately reported what a source told him was unrebutted notwithstanding deposition testimony showing he could not reconstruct from his notes precisely the phrases used by the source); *Contemporary Mission, Inc.* v. *New York Times*, 842 F.2d 612, 625-26 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988) (relying on reporter's notes to negate malice in the face of a recorded conversation in which source made a contradictory statement); *cf. Tavoulareas*, 817 F.2d at 789 ("actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith").

[27] By the same token, they also differ significantly from those in *Bindrim* v. *Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), where there was a marked disparity between profane quotations attributed to the plaintiff and the utterances actually made on tape. The defendant in *Bindrim* was aware there was a meaningful discrepancy between the published quotations describing the event and the tape recording documenting it because she attended the tape recorded session and thus *knew* that her "portrayal of what actually happened" was false. 155 Cal. Rptr. at 35. In the present case, rather than disproving the accuracy of the attributed quotations, the tape recordings serve to *support* respondents' other evidence that Masson made remarks that were substantially similar to the ones he now disputes.

lish-language publisher toned down harsh criticisms of the plaintiff that appeared in the original Spanish version and that were attributed to Ernest Hemingway. Acknowledging that the publisher knowingly

> transform[ed] Hemingway's words to the much milder "I don't trust him," [the publisher] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement . . . .

551 F.2d at 914. Such "fictionaliz[ation]" when the change "did not increase the defamatory impact or alter the substantive content" does not affect the central consideration in public figure libel—the vindication of reputational injury.[28] The same analysis was appropriately applied by the courts below in determining that "the substantive content" of Masson's acknowledged statements was reproduced in the quotations he disputed, and in therefore finding that respondents did not have knowledge of falsity or reckless disregard for truth in publishing the statements. *Cf. Ryan* v. *Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

The test for actual malice in the quotation context, applied by the court below, is consistent with this Court's prior decisions regarding the "breathing room" necessary to accommodate First Amendment concerns. Under certain circumstances, the First Amendment protects even false publications so long as the defendant publishes with a good faith belief that the report is true. *See Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776 (1986). First Amendment protection must, accordingly, extend to publications that accurately reflect the substance of a communication so long as plaintiff cannot show by clear and convincing evidence either that the defendants believed they were disseminating a defamatory falsehood, or had a high degree of awareness of the statement's probable falsity. *See New York Times*, 376 U.S. at 279-80; *Garrison*, 379 U.S. at 74; *St. Amant*, 390 U.S. at 731-

[28] *See* note 2, *supra*; *Masson*, 895 F.2d at 1536.

32. To hold otherwise would undermine the delicate balance between First Amendment freedoms and private sensibilities established by *New York Times* and its progeny.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Life*, *Money*, *People*, and *Sports Illustrated*.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 people who hold positions as directing editors of daily newspapers throughout the United States.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade association that serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to disseminate information freely concerning matters of public interest.

The Authors Guild, Inc. is the major national society of professional authors, representing more than 6,500 members throughout the nation. One of the Guild's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression. Members of the Authors Guild include not only journalists, but also biographers and historians who regularly report the words of public figures.

The Point Reyes (California) *Light* is a weekly paper with 3,800 circulation which won the Pulitzer Prize in 1979 for its coverage of the Synanon Foundation Church. *The Light* has been sued for in excess of $1 billion in six libel suits arising from its coverage of Synanon; none of these suits was successful. (*See Reader's Digest Ass'n* v. *Superior Court*, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984), *cert. denied*, 478 U.S. 1009 (1986), and *Mitchell* v. *Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).)

College Media Advisers, Inc. is a national, nonprofit organization representing more than 600 student media professionals at more than 300 colleges and universities across the country, including public, private, two-year and four-year universities.

Student Press Law Center is a national, nonprofit, incorporated, legal research, information and advocacy organization formed for the purposes of promoting and preserving the free press rights of high school and college journalists and encouraging quality student journalism.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 270,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all Americans. The core of the ACLU's concern is the First Amendment guarantee of freedom of speech and of the press.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. The Newsletter Association has a longstanding commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

Edmund Morris is the author of *The Rise of Theodore Roosevelt* (1979), for which he was awarded the Pulitzer Prize for Biography and the National Book Award in 1980. He is currently at work on a sequel, *Theodore Rex*. He is the authorized biographer of President Ronald Reagan.

David McCullough is the author of *The Johnstown Flood* (1968), *The Great Bridge* (1972), *The Path Between the Seas* (1977), for which he was awarded the National Book Award for History in 1978, and *Mornings on Horseback* (1981), for which he was awarded a second National Book Award, this one for Biography, in 1982. Each of these books involved extensive interviewing. He is currently working on a biography of Harry S. Truman.